

DEPARTMENT OF STATE REVENUE

SUPPLEMENTAL LETTERS OF FINDINGS NUMBER: 95-0730, 96-0337, 96-0338 Taxability of Electrical Energy Consumed in Food Production For The Periods 1992 through 1994

NOTICE: Under Ind. Code § 4-22-7-7, this document is required to be published in the Indiana Register and is effective on its date of publication. It shall remain in effect until the date it is superseded or deleted by the publication of a new document in the Indiana Register. The publication of this document will provide the general public with information about the Department's official position concerning a specific issue.

ISSUES

I. Sales/Use Tax Exemption for Utilities Consumed in Food Production: microwave ovens.

Authority: Ind. Code § 6-2.5-4-5;
Ind. Code § 6-2.5-5-5.1;
Ind. Code § 6-8.1-5-1;
Indiana Department of Revenue Sales Tax Information Bulletin #55 (May 31, 1989).

The taxpayer protests the partial denial of a sales tax exemption for utilities consumed by microwave ovens used in its restaurants.

II. Assessment of Taxes: accuracy of the audit report.

Authority: Ind. Code § 6-8.1-5-1

The taxpayer protests the accuracy of the auditor's report.

STATEMENT OF FACTS

The taxpayer is an Indiana corporation that owns and operates three (3) restaurants in Indiana, located in the towns of Huntington, Angola, and Wabash. Sales and use tax audits were completed on two of the restaurants on August 11, 1995, and on the third on September 7, 1995. The audits covered the tax years 1992 through 1994. As a result of the audits, the taxpayer was assessed use tax on a percentage of gas and electric utilities consumed at the restaurants.

A Letter of Findings was issued on December 30, 1999. On January 31, 2000, the taxpayer

requested a rehearing. The request was granted and a rehearing was held on May 30, 2000. At the rehearing, the taxpayer protested the partial use tax exemption for energy consumed by its microwave ovens. According to the taxpayer, the restaurants' microwaves are used solely for food production purposes and should be granted full exemption from use tax. The taxpayer also protested the accuracy of the utility studies contained in the audit report.

I. Sales/Use Tax Exemption for Utilities Consumed in Food Production: microwave ovens.

DISCUSSION

The taxpayer maintains that the microwave ovens in its three restaurants are used exclusively for food production and, therefore, should be 100 % exempt from use tax. The taxpayer has not offered any evidence supporting its position. This issue was addressed again during the rehearing. The taxpayer maintains that the microwave ovens are used only to cook food, not to thaw or defrost food.

Furnishing or selling electrical energy for commercial or domestic consumption constitutes making a retail transaction. Ind. Code § 6-2.5-4-5(b). Therefore, normal energy consumption requires the energy seller to collect and remit sales tax at the time the energy is sold. However, if, in the course of business, the electrical energy is directly consumed in the direct production of tangible personal property, the electrical energy is exempt from state gross retail tax. Ind. Code § 6-2.5-5-1.1.

Indiana Department of Revenue Sales Tax Information Bulletin #55 (May 31, 1989) states, "Restaurant food heating or cooling is taxable unless it is used in the actual production and creation of food." Utilities consumed in cooking food are exempt. The auditor granted a partial exemption for the electrical energy consumed in the operation of the taxpayer's microwave ovens based on an estimate of how the ovens were used. The auditor found that the ovens were used partially for thawing or reheating, and partially for cooking - i.e. the creation of food. The taxpayer has not submitted evidence to support its claim of full exemption for electrical energy consumed by the microwave ovens. The taxpayer has the burden of proving the assessment is wrong. Ind. Code § 6-8.1-5-1(b). The taxpayer has not met its burden in this case.

FINDING

The taxpayer's protest is denied.

II. Assessment of Taxes: accuracy of the audit report.

DISCUSSION

The taxpayer protests the accuracy of the auditor's report, specifically the figures used in the utility studies performed at the taxpayer's three restaurants in Huntington, Angola, and Wabash, Indiana. "The notice of proposed assessment is *prima facie* evidence that the department's claim

for the unpaid tax is valid. The burden of proving that the proposed assessment is wrong rests with the person against whom the proposed assessment is made.” Ind. Code § 6-8.1-5-1(b). The taxpayer was sustained in the Letter of Findings regarding a discrepancy between the amount of electrical energy consumed as shown on the utility bills for the Huntington restaurant and the amount used in the audit calculation.

Since the issuance of the Letter of Findings, the taxpayer has submitted additional evidence supporting its claim in the form of copies of 1992 electric utility bills for the Angola location. The bills for the Angola location show 281,480 total kilowatt hours consumed while the audit report indicated 346,353 kilowatt hours were used. Although copies of the electric bills for the Wabash restaurant are not available, the taxpayer claims that they would be similar to the bills for the other two locations.

The natural gas utility studies for both the Huntington and Wabash restaurants show that the majority of the gas used was consumed in the production of food. This enabled those restaurants to qualify for a predominant use exemption of 100%. According to the utility study, the Angola restaurant did not meet the requirement for the predominant use exemption. The difference is in the percentage deducted from therms used in production for higher sales volume during the summer. While the Huntington and Wabash restaurants showed average deductions of 5.07% and 4.57% for each year of the audit period, the Angola restaurant had an average deduction of 20.73%. The apparent discrepancies in the electric utility studies for the Angola and Wabash restaurants, and the natural gas utility study for the Angola restaurant, will be addressed in a supplemental audit.

FINDING

The taxpayer’s protest is sustained with regard to the accuracy of the electric utility studies for the Angola and Wabash restaurants and the natural gas utility study for the Angola restaurant, pending audit verification.